No. 82-1723

In the Supreme Court of the United States

OCTOBER TERM, 1983

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.

ON PETITION FOR LEAVE TO INTERVENE AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN RESPONSE TO THE PETITION TO INTERVENE AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

PETER R. STEENLAND, JR.
DIRK D. SNEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in the present circumstances, the Court should grant the petition of the Pyramid Lake Paiute Tribe of Indians to intervene in this case.

2. Whether owners of more than 42,000 acres of land on the Newlands Reclamation Project in Nevada are bound by the express provisions in their water right contracts with the United States limiting to 3.0 acre feet per acre the amount of Project water to be furnished to their lands each year.

3. Whether the district court correctly ordered that applications for changes in the place of diversion or manner or place of use of Newlands Project water must be submitted to the State Engineer for approval.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 697 F.2d 851. The opinion of the district court (Pet. App. 69-107) is reported at 503 F. Supp. 877.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On February 14, 1983, petitioner, which had participated amicus curiae in the case, moved in the court of appeals for leave to intervene or, in the alternative, to be substituted for the

United States as appellant. This motion was accompanied by a petition for rehearing with suggestion for rehearing en banc. On April 1, 1983, the court of appeals denied the motion for intervention or substitution of parties (Pet. App. 20) and, as a result, it had no occasion to rule on the petition for rehearing. The petitions for intervention and for a writ of certiorari were filed in this Court on April 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Pyramid Lake Paiute Tribe of Indians, petitioner herein, occupies the Pyramid Lake Reservation in northwestern Nevada. Pyramid Lake, entirely within the Reservation, is the downstream terminus of the Truckee River. A substantial volume of Truckee River water never reaches Pyramid Lake, however, because it is diverted at Derby Dam on the Truckee River and transported through the Truckee Canal to Lahontan Reservoir on the Carson River. There, the diverted Truckee River water is commingled with water from the Carson River for distribution to irrigated farmlands within the Newlands Reclamation Project.[1] See *Nevada* v. *United States*, No. 81-2254 (June 24, 1983), slip op. 2-4, 7-8 n.7. This Court's recent decision in *Nevada* v. *United States* and the earlier *Orr Ditch* case (*United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944)) concerned rights to the waters of the Truckee River. The instant case is a comprehen-

[1] Relatively small distributions of Truckee water are made from the Truckee Canal to approximately 6,348 acres of land within the Truckee Division of the Newlands Project before the Canal empties into Lahontan Reservoir. TCID Br. in Opp. 6.

sive adjudication of rights to the waters of the Carson River.

1. The United States established rights to appropriate water from the Carson and Truckee Rivers for use on the Newlands Project with a priority date of 1902 or earlier. Pet. App. 85-87 [2]; *Nevada* v. *United States*, *supra*, slip op. 5-6. Following established practice under the Reclamation Act, individual water users on the Newlands Project in turn obtained a right to receive Project water by filing an application with the Bureau of Reclamation. That application, upon acceptance by the Bureau, became a water right contract between the government and the landowner. 34 Interior Dec. 544 (1906); 40 Interior Dec. 641, 669 (1912); *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1124-1127 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977), vacated as moot, No. 82-458 (Jan. 10, 1983). See *Nevada* v. *United States*, *supra*, slip op. 11-15 & n.9; *Ickes* v. *Fox*, 300 U.S. 82, 90 (1937). As early as 1906, the regulations required the water right applications to state a specific limit on the quantity of water to be furnished. 34 Interior Dec. at 545; 40 Interior Dec. at 669; 2 S. Wiel, *Water Rights in the Western States* 1292-1294, 1297 (3d ed. 1911). Consistent with this requirement, the contracts in effect between the United States and owners of more than 42,000 of the 73,000 acres of Newlands Project land for which there are Project water rights expressly limit the right to receive Project water to no more than 3.0 acre feet per acre (afa) annually. Pet. App. 87.

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[2] Some water rights on the Carson River have a priority date earlier than 1902 because the United States acquired by contract vested Carson River water rights for 29,884 acres of land having priority dates between 1865 and 1902. Pet. App. 76-77.

On December 18, 1926, the United States entered into a contract with respondent Truckee-Carson Irrigation District ("TCID"), under which TCID assumed responsibility for the operation of the Newlands Project works (Article 6; see *Nevada* v. *United States*, *supra*, slip op. 6 & n.4) and the period for repayment of construction costs by Project water users was extended (Article 8). Article 7 of the 1926 Contract requires TCID to operate the Project in full compliance with the reclamation laws, the individual contracts between Project water users and the United States, "the rules and regulations of the Secretary [then] in force or [t]hereafter promulgated," and court orders and decrees. Article 7 also obligates TCID to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water * * *." Under Article 12 of the 1926 Contract, individual landowners on the Project who accepted the benefits of the Contract were deemed to have consented to its terms.[3]

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[3] As recited in Article 1, the Contract between the United States and TCID was entered into pursuant to, *inter alia*, the Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 23 of that Act (44 Stat. 641-642) excused water users on the Newlands Project from payment of certain of its costs, and Section 45 (44 Stat. 648-649) provided for the extension of the period for repayment of construction costs for reclamation projects generally if an irrigation district assumed liability for those charges. The 1926 Act was passed in response to the report of a committee, known as the Fact Finders, appointed to investigate the reclamation program. See S. Doc. No. 92, 68th Cong., 1st Sess. (1924). One problem addressed by the Fact Finders was the wasteful use of water on reclamation projects. *Id.* at 76-79. The Fact Finders recommended that, "if necessary, compulsory steps should be taken to prevent the excessive use of water in irrigation, as a means of making the water user protect himself against his own waste-

2. The United States commenced this quiet-title action in 1925 in the United States District Court for the District of Nevada seeking a determination of all rights to the use of the waters of the Carson River system. The United States sought confirmation of its appropriative right, with a 1902 priority date, to divert Carson waters at the rate of 5,000 cubic feet per second for irrigation and allied uses on the Newland Project. Evidence concerning this claim was taken by a special master intermittently between 1929 and 1940. In 1949 and 1950, the district court issued temporary decrees setting an annual duty of water for irrigation uses on the Project's Carson Division of not more than 2.92 afa as measured at the farm headgates (Pet. 9-10; Pet. App. 114-115; Nev. Br. in Opp. 2; TCID Br. in Opp. 4). Thereafter, until entry of the final decree in 1980, the rights of the parties were governed by the 1950 temporary decree.

3. In 1967, the Secretary of the Interior invoked his authority under Section 10 of the Reclamation Act of 1902, 43 U.S.C. 373, as preserved in Articles 7 and 34 of the 1926 Contract with TCID, to adopt regulations for the operation of the Newlands Project. 32 Fed. Reg. 3098 (1967). Those regulations, which remain in effect, affirm the trust obligation of the United States to protect the Tribe's rights in the waters of the Truckee River and Pyramid Lake. 43 C.F.R. 418.1(b). The regulations direct that criteria be established for the coordinated operation and control of the Truckee and Carson Rivers to ensure compliance with the decrees in *Orr Ditch* and the instant

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ful practices." *Id.* at 78. The provision in the TCID contract to ensure the economical and beneficial use of irrigation water implemented this recommendation.

case, respectively, and to maximize the use of Carson River water to meet the requirements of the Newlands Project and thereby to conserve Truckee River water to flow into Pyramid Lake. 43 C.F.R. 418.3(a).

4. This case remained relatively dormant until 1968, when the Tribe moved to intervene. The Tribe asserted that the regulations issued by the Secretary in 1967 had "unitized" the Carson and Truckee Rivers (Pet. App. 115) and that, because Truckee River waters are "used in conjunction with the Carson River in irrigating the federal Newlands Reclamation Project" (*id.* at 109), the final decree in this case could impair the Tribe's rights to Truckee River water for its fishery in Pyramid Lake (*id.* at 115-116). On January 3, 1969, the district court denied the Tribe's motion to intervene (Pet. App. 107-112) on the grounds that the Tribe's application was untimely under Fed. R. Civ. P. 24(a), that the Tribe had no interest in the waters of the Carson River or in the outcome of the instant case, and that, in any event, the Tribe's interests were adequately represented by the United States. The court of appeals affirmed on like grounds (Pet. App. 113-122; *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763 (9th Cir. 1970)), and this Court denied certiorari, 401 U.S. 909 (1971).

5. The Tribe, meanwhile, had sued the Secretary and the Attorney General in the United States District Court for the District of Columbia seeking protection of its Truckee River rights. The Secretary, pursuant to the general regulations promulgated in 1967, adopted specific operating criteria for the Newlands Project for 1973. The Tribe then contended in the suit in the District of Columbia that the proposed criteria furnished more water to the Newlands Proj-

ect than was provided for in the *Orr Ditch* decree and the 1950 decree then in effect in the instant case, permitted wasteful practices, and failed to fulfill the Secretary's trust obligation to maximize flows into Pyramid Lake. The district court agreed and ordered the Secretary to amend the operating criteria to maximize flows into Pyramid Lake. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 262-266 (D.D.C. 1972); Pet. App. 21-50. In so holding, the court observed that provisions for enforcement of the criteria adopted by the court would be necessary because TCID, which had control of the Project works under the 1926 Contract, had formally announced that it would "disregard" even the less stringent criteria adopted by the Secretary and would "divert water as it chooses by giving instructions to its own water masters" (354 F. Supp. at 258; Pet. App. 35).

The Secretary acquiesced in the district court's decision in *Pyramid Lake Paiute Tribe* v. *Morton* and published the new operating criteria ordered by the district court. 38 Fed. Reg. 6697 (1973). After TCID announced that it would not adhere to these new criteria, the Secretary, pursuant to authority reserved in Article 32 of the 1926 Contract with TCID, notified TCID on September 14, 1973 of his intent to cancel that Contract and thereby to terminate TCID's authority to operate the Project. Before the termination could take effect, TCID sued the Secretary in the United States District Court for the District of Nevada to prevent the termination. That suit was tried in 1979, but has not yet been decided. *Truckee-Carson Irrigation District* v. *Secretary of the Interior*, Civil No. R-74-34-BRT (D. Nev.).

6. In the 1970's, the parties to the instant case exhibited a renewed interest in the entry of a final de-

cree establishing rights to the use of Carson River water. After evidence regarding the appropriate water duty for Newlands Project lands was presented to the district court in 1979, the district court entered its final decree on December 18, 1980. The district court determined that on the Newlands Project, the annual water duty delivered to the land (*i.e.*, exclusive of loss in storage and transportation) should be 3.5 afa for bottom lands and 4.5 afa for bench lands (Pet. App. 92). The district court further ruled that holders of decreed water rights, including those on the Newlands Project, who desire to change the place of water diversion or place or manner of water use must apply to the Nevada State Engineer, with the State Engineer's determination subject to review by the district court (Pet. App. 104-106). The court noted that under Nevada law, such an application must be denied if the proposed change conflicts with existing rights, even those with a junior priority, or "threatens to prove detrimental to the public interest" (*id.* at 104-105, quoting Nev. Rev. Stat. § 533.370(3) (1981)).

7. The court of appeals affirmed the judgment of the district court on the issues relevant here.

a. The court of appeals rejected the contention advanced by the United States and the Tribe that water deliveries to 42,447 acres on the Newlands Project must be limited to 3.0 afa, as provided by the express terms of the water-rights contracts for those lands that were entered into before 1926 (Pet. App. 87-88).[4] The court stressed that it was not holding that

[4] The court also rejected the government's claim that water rights for the entire Project were limited to 3.0 afa because a 1903 Nevada statute, since repealed, limited irrigation uses of appropriated water to that amount. The court of appeals, agreeing with the district court (Pet. App. 85-87),

the contracts were ultra vires when made. Instead, the court expressed the view that beneficial use is a "dynamic concept" whose measure may change over time and that the appropriate question therefore was whether the district court reached a correct determination of beneficial use as of 1980 (Pet. App. 8). On this premise, the court sustained the district court's finding that water duties of 3.5 and 4.5 afa were appropriate notwithstanding the contract limitations (*id.* at 10-13).

b. The court of appeals also sustained, as applied to Newlands Project lands, the district court's holding that applications for changes in the place of diversion or place or manner of use of water must be filed with the State Engineer (Pet. App. 13-15). The court stressed that the State Engineer would be bound to follow applicable federal law, such as the requirement that water appropriated for irrigation purposes be used only for those purposes and on the land to which the water right is appurtenant (*id.* at 14). In addition, the court reasoned that federal interests would be safeguarded as a procedural matter by the assurance that the United States will receive notice of such applications and by the provision in the decree for review of the State Engineer's rulings by the district court (*id.* at 15).[5]

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held that this 1903 state statute did not govern or restrict Project water rights because those rights had vested when the United States appropriated water for the Project in 1902, before the statute was enacted (Pet. App. 8, 9-10). The Tribe does not challenge that holding here.

[5] The court of appeals vacated (Pet. App. 17-19) that portion of the district court's decree setting aside a 30,000 acre-foot pool at Lahontan Reservoir for fishing and recreation. Both the government and TCID had protested this award because "no party presented evidence to establish a specific, pub-

c. The United States obtained an extension of time, to and including February 14, 1983, within which to file a petition for rehearing in the court of appeals, but subsequently elected not to file a rehearing petition. However, within the extended period, the Tribe filed a motion for intervention or, in the alternative, for substitution of the Tribe for the United States as the appellant. The Tribe tendered with its motion to intervene a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied the Tribe's motion to intervene or for substitution of parties on April 1, 1983 (Pet. App. 20), and thus did not rule on the Tribe's petition for rehearing.

ARGUMENT

The United States does not oppose the Tribe's petition to intervene. However, we suggest that the petition for a writ of certiorari should be denied.

1. We do not oppose the Tribe's motion to intervene in this Court, now that the United States has elected not to seek review of the court of appeals' decision. When the Tribe's motion to intervene was denied by the district court in 1969, the denial was based in large measure on the conclusion that the Tribe had no interest in the proceedings because it had no legal right to waters of the Carson River (Pet. App. 111-112, 119-122). Respondents State of Ne-

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lic recreational right" (Pet. App. 17). The court of appeals remanded with instructions that the district court determine whether such a recreational pool is legally permissible under federal reclamation law and is necessary as a matter of fact in this case, noting that any recreational water duty "must be subordinate to the agricultural needs of the Newlands Project farmers" (Pet. App. 19). The Tribe does not challenge this aspect of the ruling below.

vada and TCID make the same argument here (Nev. Br. in Opp. 5-7; TCID Br. in Opp. 7-9). Although the United States opposed the Tribe's motion to intervene in part on this ground in 1969 (Pet. App. 109-110; U.S. Br. in Opp., *Pyramid Lake Paiute Tribe* v. *United States* (No. 927, 1970 Term)), we now believe that this view ignores the obvious interrelationship between the Truckee and Carson Rivers.

Pyramid Lake is the terminus of the Truckee River, and any water diverted from the Truckee therefore results in a gallon-for-gallon reduction in the amount of water furnished to the Lake and its fishery. As this Court recognized in *Nevada* v. *United States*, *supra*, slip op. 4, and as TCID concedes (TCID Br. in Opp. 7), the waters of the Carson River are commingled in Lahontan Reservoir with waters diverted from the Truckee River, and the waters then are distributed from Lahontan Reservoir to Newlands Project lands. Because the waters of the two Rivers are commingled in this fashion, the water right contracts at issue in this case confer a right to receive water from the Project, not from one of the two Rivers. Therefore, although this case actually adjudicates rights only to Carson River waters, the court of appeals' holding that Project landowners whose water right contracts specify a maximum water right of 3.0 afa are not bound by that limitation presumably will apply to all Project water, including that diverted from the Truckee River. The effect of the judgment below therefore will be a greater diversion of Truckee River water to the Project to satisfy the water duties of 3.5 or 4.5 afa decreed by the district court than would be required to satisfy the maximum of 3.0 afa specified in the contracts.[6]

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[6] TCID contends (TCID Br. in Opp. 8-9, 11) that Project lands already were entitled to receive 3.5 or 4.5 afa of Truckee

The interrelationship of the two River systems also is reflected in the Interior Department regulations governing the operation of the Newlands Project. 43 C.F.R. Part 418. Those regulations recognize the trust responsibility of the United States to protect the interests of the Tribe in Pyramid Lake and require that diversions from the Truckee be held within decreed rights in order to make additional water available for the Lake. In addition, those regulations require that maximum use be made of the flows of the Carson River to satisfy the demands of the Newlands Project, thereby making as much Truckee River water as possible available for Pyramid Lake. 43 C.F.R. 418.3(a).[7]

River water under the *Orr Ditch* decree and that the decree in this case concerning rights to Carson River water therefore does not incrementally harm the Tribe. This contention is mistaken. *Orr Ditch* confirmed a right in the United States to divert water for the Newlands Project, and set a *maximum limit* on this right by providing that the amount of water allowed for irrigation "shall not exceed" 3.5 afa for bottom lands or 4.5 afa for bench lands. App. to Pet. for Cert. 59a, *Nevada* v. *United States* (No. 81-2245, 1981 Term). The *Orr Ditch* decree did not establish these maximum figures as an *entitlement* for individual parcels of land. See App. to Pet. for Cert. 146a. As the Court explained in *Nevada* v. *United States*, *supra*, slip op. 11-15 & n.9, individual Project water users obtained a right to Project water when they entered into contracts for such a right, and the terms of those contracts therefore define the individual water rights.

[7] The Tribe's interest in the Carson River adjudication is not diminished by the Court's decision in *Nevada* v. *United States*, *supra*, that the doctrine of res judicata bars judicial recognition of a prior reserved right to waters of the Truckee River for the benefit of the Tribe as against the previously decreed rights of Newlands Project landowners and subsequent appropriators of Truckee River waters. The fact remains that any Truckee River waters remaining after satisfy-

For the foregoing reasons, we believe the Tribe has a sufficient interest in the case to satisfy the requirements for intervention as of right under Fed. R. Civ. P. 24(a) or permissive intervention under Fed. R. Civ. P. 24(b). Under Rule 24(a), it is enough that the applicant "claims an interest relating to the property or transaction which is the subject of the action" and that he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. Here, the Tribe's interest in Truckee River water is "related to" the determination of rights in the Carson River, with which Truckee River waters are commingled for delivery under contracts applicable to both Rivers. And the Tribe's ability to protect its interest in minimizing diversions from the Truckee River by ensuring that Project water deliveries conform to the terms of individual water right contracts will be impaired if the judgment below stands. The reason is that the Tribe will be bound by the holding on the contract limitation issue in this case by virtue of the United States' appearance as a party. *Nevada* v. *United States*, *supra*. Similarly, the Tribe meets the standard for permissive intervention under Fed. R. Civ. P. 24(b), which requires only that the "applicant's claim or defense and the main action have a question of law or fact in common."

Denial of intervention in 1969 also rested in part on the ground that the United States would adequately represent the interests of the Tribe. The gov-

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ing those rights will flow into Pyramid Lake. The size of this residuum available for Pyramid Lake necessarily will be reduced if the amount of water required to be made available to Project water users is increased beyond the amount specified in their contracts.

ernment in fact did so in the district court and court of appeals. But because the United States has elected not to petition for certiorari, it cannot be said that the Tribe's interests are represented by the United States before this Court. To be sure, Fed. R. Civ. P. 24(a) and (b) require that a motion to intervene be "timely," and intervention was denied in part on this ground in 1969, since the Tribe's motion at that time was filed more than 40 years after the suit was brought. But we believe it would be appropriate to regard the timeliness of intervention as affected by the question of the adequacy of representation. Here the Tribe moved immediately to intervene, before the judgment became final, when it appeared that the United States would not seek further review. Compare *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 5, 8-9; *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980). The other parties to the case are not significantly prejudiced by the timing of the Tribe's petition to intervene, because the Tribe actively participated amicus curiae below and does not raise any new issues here, but rather presses arguments advanced by the United States in the court of appeals on which the government itself could have sought certiorari.

2. The Tribe argues (Pet. 17-26) that the court of appeals erred in excusing the owners of some 42,000 acres of Project land from the provisions of the water right contracts they or their predecessors in interest voluntarily entered into with the United States that limit water deliveries to 3.0 afa annually. Although we agree that the court of appeals' decision is erroneous, we do not believe that decision warrants review by this Court.

a. As we have explained above (see page 3, *supra*), from the beginning the Department of the

Interior implemented the Reclamation Act through a system of contracts with individual water users that specified limitations on the amount of water to be furnished. Article 7 of the 1926 Contract between TCID and the United States requires TCID to deliver water in accordance with the terms of such contracts. See page 4, *supra*.[8] The comprehensive report of the Fact Finders in 1924 likewise took the view that water rights on reclamation projects "should never be established except upon the basis of a definite quantity of water." S. Doc. No. 92, 68th Cong., 1st Sess. 78 (1924). And it was already well established under state law at the beginning of this century that an appropriation of water was limited to the amount set forth in the original claim (1 S. Wiel, *supra*, at 496) and that limitations in contracts between a water user and a water company were binding upon the water user. 3 C. Kinney, *A Treatise on the Law of Irrigation* 272 (2d ed. 1912).

Against this background, it is not surprising that the court of appeals explicitly did not hold that the contract provisions at issue here were ultra vires when they were agreed to by the parties (Pet. App. 8). Nor could the court of appeals find the 3.0 afa limitation arbitrary or capricious, in light of the contemporaneous 1903 Nevada statute providing for a maximum of 3.0 afa for irrigation (see note 4, *supra*), the average water deliveries of less than 3.0 afa after the Project was opened (S. Doc. No. 92, *supra*, at 216), and the temporary decree in effect

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[8] In view of this express incorporation of the provisions of the individual contracts into the 1926 Contract with TCID, TCID plainly errs in contending (TCID Br. in Opp. 14) that the limitations in the individual water right contracts were modified by the 1926 Contract.

in this case from 1950 to 1980 which set a ceiling of 2.92 afa. The court of appeals held, however, that beneficial use is a "dynamic concept" that may expand over time and that the district court therefore properly evaluated the issue as of the year 1980 (Pet. App. 8). But even if the district court were correct that Project lands might benefit from more water at the present time, the appropriate procedure would be for the landowners to seek to renegotiate their contracts with the Secretary. The district court itself could not properly reform the original contracts, especially on a *retroactive* basis that fixes a 1902 priority date for the additional water at the expense of the intervening demand for water for Pyramid Lake.[9]

b. Notwithstanding our view that the court of appeals erred on the contract issue, we have not petitioned for a writ of certiorari to review the judgment of the court of appeals and we do not urge the Court to grant the Tribe's petition raising the same issue. We have been informed by the Department of the Interior that it does not believe that the question of the binding effect of contract limitations is one of general importance on reclamation projects in the States comprising the Ninth Circuit. We note in this regard that the decision by the District of Columbia Circuit on remand from this Court's decision in *Ickes* v. *Fox*, 300 U.S. 82 (1937) — see *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943) — is

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[9] Nor does a supposed lack of uniformity excuse compliance. The contracts covering the Project lands that do not contain a specific limitation of 3.0 afa likewise do not contain a *higher* figure that could be regarded as inconsistent; they simply do not specify any particular maximum figure. The early practice on the Project suggests that the Secretary in fact regarded the 3.0 figure to be the appropriate amount for beneficial use on *all* Project lands.

consistent with the decision below. Yet despite that old precedent, the issue of the validity of contract limitations does not appear to have recurred in the reclamation program. Moreover, this case might be thought to arise in somewhat unique circumstances insofar as the court below rested its decision in part on a supposed lack of uniformity among and enforcement of the contract provisions. If the decision in this case creates broader difficulties in the administration of the reclamation program in the future, review could be sought at that time.

To be sure, the decision does have a concrete impact on the Tribe, which estimates (Pet. 12-13 & n.5) that it will lose a minimum of 38,000 afa of water annually as a result. Yet the fact remains that the present case is confined to the particular circumstances of the Pyramid Lake Reservation and the Newlands Project. This Court, in *Nevada* v. *United States, supra,* already has given plenary review to another aspect of the overall controversy regarding the allocation of water between these two entities. We do not urge it to grant plenary review in another aspect of that controversy. Indeed, we had urged the Court to deny the certiorari petitions in *Nevada* v. *United States* in part because of the unique circumstances of the case (U.S. Br. in Opp. 21-24 (Nos. 81-2245 and 81-2276, 1982 Term)), and there does not appear to be a basis for suggesting a different disposition here.

We are mindful of the continuing obligation of the United States to protect the Lake and its fishery for the Tribe. But we are mindful as well of the other responsibilities with which Congress has charged the Executive in this area (see *Nevada* v. *United States, supra,* slip op. 16-17, 29-31) and of the public interest in bringing to a close this phase of the north-

western Nevada water rights litigation, which is now 58 years old. We trust that within the limits of the decrees in this case and *Orr Ditch*, the maximum protection possible may be afforded Pyramid Lake and its fishery.

3. We also do not believe review is warranted of that portion of the judgment below which provides for applications for changes in the place of diversion or manner or place of use—even as regards Project water rights—to be submitted to the State Engineer. The potential impact of this requirement is uncertain at this time, and the provision for interested parties to seek review of the State Engineer's determination in the district court will afford some protection for federal interests, perhaps including those of the Tribe in minimizing diversions of Truckee River waters. Cf. Pet. App. 107. Moreover, the court of appeals made clear that the State Engineer would be bound to follow federal law where applicable (*id.* at 15), which presumably would include appropriate regulations for the operation of the Newlands Project that might be issued by the Secretary, should the need arise, pursuant to the authority expressly conferred by Section 10 of the Reclamation Act, 43 U.S.C. 373, and preserved in Articles 7 and 34 of the 1926 Contract between TCID and the United States.

CONCLUSION

The petition for intervention should be granted and the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

PETER R. STEENLAND, JR.
DIRK D. SNEL
Attorneys

AUGUST 1983

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